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DOJ and FDA Continue to Feast on Producers of Contaminated Foods

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On November 15, 2016, a United States District Judge sentenced the owner/president of Oasis Brands, Inc. (“Oasis”), Christian Rivas, to 15-months’ imprisonment in connection with Rivas’s guilty plea to felony and misdemeanor counts for distributing contaminated cheese products with the intent to defraud. The sentencing comes on the heels of other high profile food safety investigations and prosecutions; but, while pundits have expressed uncertainty regarding the nature and extent of federal enforcement of food safety laws under President-elect Trump, the U.S. Department of Justice and the Food & Drug Administration have suggested continued cooperation and investigations in this area.

“Consumer protection is a top priority for the U.S. Attorney’s Office,” stated Wifredo A. Ferrer, the U.S. Attorney for the Southern District of Florida, emphasizing “continue[d] cooperation with the FDA to identify for prosecution cases where consumers are exposed to the risk of serious harm from contaminated food purchased in the marketplace, while being fraudulently led to believe that it is safe.”¹ In addition, Justin D. Green, Special Agent in Charge, U.S. Food & Drug Administration, Office of Criminal Investigations, confirmed that prosecutors and the FDA “will continue to pursue to bring to justice those who put the public’s health at risk by allowing contaminated foods to enter the U.S. marketplace.”²

Here, Oasis was engaged in the manufacture, processing, and repackaging of cheese products for wholesale distribution to customers and retail food markets in Florida and elsewhere.³ Rivas, who was solely responsible for Oasis’s operations, received notice as early as July 2014 that a sample of “Lacteos Santa Martha Quesito Casero Fresh Curd” (which had been sold in a Virginia grocery store) had tested positive for *Listeria monocytogenes* bacterium (“listeria”).⁴ The FDA inspected Oasis’s facility, advised Rivas of the bacterial contamination, and collected additional samples.⁵ Those samples also tested positive for listeria and the FDA inspectors observed other unsanitary conditions at the facility.⁶

At the conclusion of the inspection, Rivas agreed, among other things, to cease distribution of cheese products from the Oasis facility pending sanitation of the same, testing to confirm that the listeria contamination had been remediated, and that all in-process curd cheese products would not be shipped pending further discussions with FDA officials.⁷ Nearly six weeks after making this agreement, Rivas confirmed during a follow-up inspection that Oasis had distributed approximately 133 cases of the same curd that produced a sample that had tested positive for listeria.⁸ Rivas did so to “minimize



monetary losses” that would have occurred if that portion of cheese inventory had been destroyed.⁹ Rivas acknowledged that at least 10 individuals were sickened.¹⁰

Rivas pled guilty to one felony count of introducing an adulterated food product into the stream of commerce with the intent to defraud, in violation of 21 U.S.C. §§ 331(a) and 333(a)(2), because he knowingly distributed cheese products in interstate commerce from inventory that he knew had tested positive for the presence of listeria.¹¹ Rivas also pled guilty to a strict liability misdemeanor offense, pursuant to 21 U.S.C. §§ 331(a) and 333(a)(1).¹² Rivas was sentenced to a low/minimum security facility in Miami; the restitution amount is to be determined.¹³

The Rivas prosecution provides an opportunity to assess the investigative, regulatory, and enforcement landscape with respect to food safety with a forward-looking perspective. Thus, we note at least the following:

- Rivas’s conduct here demonstrated the requisite intent to defraud to charge a felony under 21 U.S.C. §§ 331(a) and 333(a)(2). But, he also pled guilty to a *strict liability* misdemeanor, 21 U.S.C. §§ 331(a) and 333(a)(1), irrespective of his intent to commit a crime. This is an important tool available to prosecutors if a person or organization introduces, delivers, or causes the introduction or delivery of an adulterated food product into interstate commerce.
- Notwithstanding the fact that Rivas was singularly responsible for Oasis’s operations here, as a general matter, the government has significant discretion to hold accountable a corporate officer for actions taken by (or the inaction of) her/his subordinates, pursuant to the Park Doctrine and established precedent.
- Early indicators appear to suggest that food safety may continue to be a high priority item for the DOJ and FDA, including increased cooperation between the agencies.
- The Centers for Disease Control & Prevention estimate that nearly one out of six Americans—nearly 48 million people—are sickened by foodborne illnesses every year.¹⁴ Putative defendants, including organizational defendants, should have a plan in place to address foodborne illnesses and consumer safety. This includes, for example, a training sequence, evaluating complaint handling and incident response, reviewing policy manuals and other key documents, and developing a crisis management checklist or flowchart.

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¹ See *Miami-Dade Resident Sentenced to Fifteen Months in Prison for Distributing Contaminated Cheese*, at <https://www.justice.gov/usao-sdfl/pr/miami-dade-resident-sentenced-fifteen-months-prison-distributing-contaminated-cheese> (last visited on Nov. 21, 2016).

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² See *id.*

³ See *United States v. Rivas*, Case No. 16-20581-CR-SCOLA/OTAZO-REYES, Docket Entry No. 13, Defendant's Stipulated Statement of Facts Pursuant to Fed. R. Crim. P. 11(b)(3), at ¶¶ 5-6 (Sep. 9, 2016) ("Statement of Facts").

⁴ See *id.*

⁵ See *id.* at ¶¶ 6-7.

⁶ See *id.*

⁷ See Statement of Facts at ¶¶ 8-10.

⁸ See *id.*

⁹ See *id.* at ¶¶ 11-12.

¹⁰ See *id.*

¹¹ See *United States v. Rivas*, Case No. 16-20581-CR-SCOLA/OTAZO-REYES, Docket Entry No. 12, Plea Agreement, at ¶ 2 (Sep. 2, 2016) ("Plea Agreement").

¹² See *id.*

¹³ See *United States v. Rivas*, Case No. 16-20581-CR-SCOLA/OTAZO-REYES, Docket Entry No. 21, Judgment in a Criminal Case (Nov. 15, 2016).

¹⁴ See <http://www.foodsafety.gov> (last visited on May 17, 2016).